HANDOUT 1

I am a witness

On February 27, 2007, the Assembly of First Nations (AFN), a political organization representing all First Nations in Canada, and the First Nations Child and Family Caring Society of Canada (the Caring Society), a national non-profit organization providing services to First Nations child welfare organizations, took the historic step of holding Canada accountable before the Canadian Human Rights Commission for its current treatment of First Nations children. The complaint alleges that the Government of Canada had a longstanding pattern of providing less government funding for child welfare services to First Nations children on reserves than is provided to non-Aboriginal children.

The inequalities in First Nations child welfare funding are longstanding and well documented (Royal Commission on Aboriginal Peoples [RCAP], 1996; McDonald & Ladd, 2000; Loxley et. al., 2005; Amnesty International, 2006; Assembly of First Nations, 2007; Auditor General of Canada, 2008; Standing Committee on Public Accounts, 2009) as are the tragic consequences of First Nations children going into child welfare care due, in part, to the unavailability of equitable family support services (McDonald & Ladd, 2000; Blackstock and Trocme, 2005; Amnesty International, 2006; Clarke, 2007; Auditor General of Canada, 2008; National Council on Welfare, 2008). This inequity is further amplified for First Nations children by shortfalls in education funding, housing and publically funded voluntary sector supports (Blackstock, 2008).

In October of 2008, the Canadian Human Rights Commission ordered a tribunal to determine whether or not discrimination had occurred pursuant to the Canadian Human Rights Act. The Canadian Human Rights Tribunal is similar to a court process with all evidence taken under oath. The Tribunal is open to the public and can order a remedy to discrimination. After numerous attempts by the federal government to have the case dismissed, hearings at the Tribunal began in February 2013, and concluded in October 2014. On January 26, 2016, the Tribunal ruled that the Canadian government is racially discriminating against 163,000 First Nations children.

First Nations Child Welfare Funding

Indigenous and Northern Affairs Canada (INAC) is responsible for the provision and funding of child welfare services for First Nations families living on reserves through its First Nations Child and Family Services (FNCFS) Program, created in 1990 and through a separate arrangement in Ontario known as the 1965 Indian Welfare Agreement. INAC provides funding to First Nations, First Nations child welfare agencies, and directly to provinces in some cases. The FNCFS Program supports over 100 First Nations agencies serving approximately 160,000 children and youth in approximately 447 of 573 First Nations communities (First Nations recognize 633 First Nations). The level of funding is determined by a formula developed in 1988. It has been well documented that the proportion of children on reserves residing in care is far greater than that of children living off reserves.

An audit conducted in May 2008 by the Auditor General of Canada (AOG) and a March 2009 report issued by the Standing Committee on Public Accounts concluded the following regarding the funding of First Nations child welfare on reserves:

1) Funding to First Nations child welfare agencies needs to be compared to provincial funding of similar agencies:

The Committee report indicated concern regarding how the level of funding is determined by INAC and how the Department is assured it is treating First Nations children equitably. The report also states that it would be reasonable to expect First Nations agencies to receive greater funding given their “unique and challenging circumstances.”

2) The current funding formula is outdated:

- The formula is based on the assumption that each First Nations agency has 6% of onreserve children in care. The AOG audit found that the actual percentages of children in care on reserves ranged from 0-28% in 2007.
- The current formula provides only minimal funding for prevention services and other least disruptive measures to maintain children in the family home (e.g., in-home supports). • The formula is unresponsive to variations in the operating costs of First Nations agencies (e.g., differences in community needs or size of agencies).
- There is inconsistency across provinces in the interpretation of costs covered by the formula when the province has not fully delegated child welfare services to First Nations agencies. Will a new funding formula fix the problem?
- A new formula was developed in 2007 in Alberta First Nations agencies based on an enhanced prevention approach to allow greater flexibility to First Nations child welfare agencies to allocate funds to different types of child welfare services (e.g., family supports and kin care). • This new formula has since been implemented in Saskatchewan and Nova Scotia and INAC hopes to implement it in the remaining provinces by 2012. 2
- Both the AOG audit and the Standing Committee report expressed concerns that the new formula still calculates funding based on a fixed percentage of First Nations children in care rather than using need as the basis for funding.
- The Committee notes that continuing to use a fixed percentage as the basis for funding under the new formula will leave some agencies still underfunded to provide needed services to children and families.
- The Committee was also “quite concerned” that the majority of First Nations children in care on reserves continue to live under a funding policy that clearly does not work.
- The Committee recommends that INAC immediately modify First Nations child welfare funding on reserves rather than wait for new agreements with provinces to be signed as many First Nations children are currently being taken into care unnecessarily and **“This is unacceptable and clearly inequitable.”**

References:

Auditor General of Canada report (May, 2008*). Chapter 4: First Nations Child and Family Services Program-Indian and Northern Affairs Canada.*
Standing Committee on Public Accounts (March, 2009). *Chapter 4, First Nations Child and Family Services Program- Indian and Northern Affairs Canada of the May 2008 report of the Auditor General.*

Compiled by Nicole Petrowski, Centre of Excellence for Child Welfare September 30, 2009

Information Sheet

Jordan’s Principle

Questions and Answers

Revised December 2016

What is Jordan’s Principle?

Jordan’s Principle (JP) is a child first principle named in memory of Jordan River Anderson. Jordan was a First Nations child from Norway House Cree Nation in Manitoba. Born with complex medical needs, Jordan spent more than two years unnecessarily in hospital while the Province of Manitoba and the federal government argued over who should pay for his at home care. Jordan died in the hospital at the age of five years old, never having spent a day in his family home.

Jordan’s Principle ensures that First Nations children can access public services on the same terms as other children without experiencing any service denials, delays or disruptions related to their First Nations status. The government of first contact pays for the service and resolves jurisdictional/payment disputes later.

Why is JP important?

Payment disputes within and between federal and provincial governments over services for First Nations children are not uncommon. First Nations children are frequently left waiting for services they desperately need, or are denied services that are available to other children. This includes services in education, health, childcare, recreation, and culture and language. Jordan's Principle calls on the government of first contact to pay for the services and seek reimbursement later so the child does not get tragically caught in the middle of government red tape.

What did the Tribunal say about JP?

In the decision on the case on First Nations child welfare, the Canadian Human Rights Tribunal ("Tribunal") concluded that the approach the federal government [Indigenous and Northern Affairs Canada (“INAC”)] has taken regarding Jordan's Principle since Jordan’s Principle was unanimously endorsed by the House of Commons in 2007, was discriminatory, contrary to section 5 of the Canadian Human Rights Act. In the January 26, 2016 ruling, the Tribunal ordered the federal government to immediately stop applying the discriminatory definition of Jordan’s Principle and to immediately take measures to implement the full definition of Jordan's Principle.

On April 26, 2016, the Tribunal found that the federal government was not respecting the Tribunal's January 26, 2016 order to "immediately implement the full meaning and scope of Jordan's Principle." The Panel expressed its surprise that the federal government’s discussions with partners and stakeholders were taking so long. The Tribunal ordered the federal government to immediately apply Jordan's Principle to all jurisdictional disputes (including between federal departments) involving all First Nations children. The Tribunal has said that going forward, the government organization that is contacted first needs to pay for the service for the child without policy review or case conferencing.

The Tribunal gave INAC until May 10, 2016 to report to the Panel to confirm that the definition and scope of Jordan’s Principle outlined in the Tribunal’s April 26, 2016 order had been

implemented.

While provincial governments and Health Canada are not parties to the Complaint before the Tribunal, the Tribunal's order is enforceable against INAC, meaning the federal government must do what the Tribunal says.

What steps did the federal government take to implement JP?

To ensure implementation of the remedies including Jordan's Principle, the Tribunal requires INAC to submit "compliance reports" which outline its action to date.

INAC's May 10, 2016 report said that disputes within the federal government were included, but did not specifically say the federal government is applying Jordan's Principle to all jurisdictional disputes. Their report also said that restricting JP to only children with multiple disabilities getting services from multiple service providers would stop, but did not specifically confirm that Jordan's Principle will apply it to all children. Lastly, the report stated that INAC had initiated discussions with the provinces/territories on Jordan's Principle but they did not say how, or if, First Nations and First Nations child and family service agencies would be engaged in those discussions or what the nature of those discussions would have been.

On June 8, 2016, the Caring Society responded to the May 10 report asking for clarification about the issues above and reiterated the importance of children being put first. The Tribunal is expected to rule again on Jordan's Principle to resolve the differences between what Canada was ordered to do and the compliance concerns raised by the Caring Society.

Who can I contact if I have a JP situation?

The Indigenous and Northern Affairs of Canada website suggests contacting your regional INAC or Health Canada (First Nations and Inuit Health Branch) Regional office if you think you have a Jordan's Principle situation. This is a list of contacts or 'focal points' for Jordan's Principle. If you have any difficulties reporting a Jordan's Principle case, please contact the Caring Society info@fncaringsociety.com or (613) 230-5885.

Please check back regularly for updated lists

General inquiries:

INAC: 1-800-567-9604

Jonathan Riou, (613) 404-6628
jonathan.riou@aadnc-aandc.gc.ca

Valerie Hisko, (819) 639-7406
valerie.hisko@aadnc-aandc.gc.ca

Alberta Region:

INAC: Carol Schimanke, (780) 495-2589

Rachel Bouchard, (780) 218-2709

Health Canada: Coreen Everington, (780) 495-8660

Atlantic Region:

INAC: Joe Behar, (902) 669-0359

Health Canada: Wade Weir, (902) 478-1286

British Columbia Region:

INAC: Bill McArthur, (604) 317-3548

Manitoba Region:

Health Canada: Joe Gacheru, (204) 983-2213 or joe.gacheru@canada.ca

Ontario Region:

INAC: Phil Digby (416) 954-0773

Bernadette Crook (807) 624-1539

Health Canada: Tracey Clarke, (613) 962-0142

Quebec Region:

INAC: Caroline Félix, (418) 473-7886

Health Canada: Julia Thibeault, (514) 283-1903

Yukon Region:

INAC: Tammy Bazylinski, (867) 667-3356

Information Sheet

Canadian Human Rights Tribunal Decisions on First Nations Child Welfare and Jordan's Principle

Case Reference CHRT 1340/7008

October 31, 2016

Introduction

The Federal Government of Canada funds First Nations child and family services on reserve through the Department of Indigenous and Northern Affairs [INAC] (previously the Department of Aboriginal Affairs and Northern Development Canada). INAC requires that First Nations child and family service agencies on reserve use provincial/territorial child welfare laws as a condition of funding. Within its First Nations Child and Family Services Program, INAC uses four child welfare funding approaches: 1) funding arrangements with provinces and territories; 2) Directive 20-1; 3) the Enhanced Prevention Focused Approach [EPFA]; and 4) the 1965 Indian Welfare Agreement in Ontario. It also funds provinces/territories to provide child welfare services to First Nations children on reserves where there are no agencies. Government of Canada records show INAC funds provinces/territories at approximately 2-4 times the amount it will pay First Nations to delivery the same service.

Jordan's Principle is named in memory of Jordan River Anderson who is a First Nations boy from Norway House Cree Nation who spent over 2 years unnecessarily in a hospital because Health Canada/INAC and the Province of Manitoba could not agree on payment for his at home care due to his First Nations status. Jordan died in the hospital in 2005 never having spent a day in a family home. Jordan's Principle aims to ensure First Nations children can access ALL public services normally available to other children on the same terms. Parliament passed Motion 251 on December 12, 2016 in support of Jordan's Principle and then quickly crafted a definition for Jordan's Principle (children with complex medical needs and multiple service providers) that was so narrow that no child ever qualified despite prolific evidence in Government of Canada documents that First Nations children were routinely denied or delayed access to services. The Federal Court found Canada's approach to Jordan's Principle to be unlawful in 2013 and the Canadian Human Rights Tribunal found it to be discriminatory in 2016. For more information and to read the rulings go to www.jordansprinciple.ca

In 2007, the First Nations Child and Family Caring Society of Canada and the Assembly of First Nations filed a complaint pursuant to the *Canadian Human Rights Act* alleging that INAC's provision of First Nations child and family services was discriminatory (CHRT 7008/1340). Canada fought the case on legal technicalities bringing at least 8 separate motions to get the case dismissed before the evidence could be heard. They were

unsuccessful and over 72 days of hearings were held between February of 2013 and October of 2014.

On January 26, 2016, the Canadian Human Rights Tribunal [CHRT or Tribunal] released its decision substantiating all aspects of the claim and ordering Canada to immediately cease its discriminatory conduct. The Tribunal retained jurisdiction and ordered Canada to provide compliance reports. Unsatisfied with Canada's progress, the CHRT has issued two compliance orders. The first compliance order was released in April of 2016 (2016 CHRT 10) and the second in September of 2016 (2016 CHRT 16). The CHRT has ordered a case conference on November 7-9, 2016 and further orders are possible.

Overview of CHRT Decisions

2016 CHRT 2

On January 26, 2016 the CHRT issued the decision on the main case. The CHRT, consisting of a three-member panel, found that Canada's flawed and inequitable provision of First Nations child and family services is discriminatory pursuant to the *Canadian Human Rights Act* on the grounds of race and national ethnic origin. The Tribunal also found that Canada's failure to ensure First Nations children can access government services on the same terms as other children via a mechanism known as Jordan's Principle was also discriminatory and contrary to the law.

The Tribunal noted that Canada's discriminatory child welfare funding creates an incentive to bring children into care by denying families equitable prevention services that take full account of the their needs, culture and the multi-generational impacts of Residential Schools. According to the Tribunal, Canada's ongoing discrimination widens the harm wrought by residential schools instead of narrowing it.

The Tribunal also noted in para. 461 that "[N]otwithstanding numerous reports and recommendations to address the adverse impacts outlined above, including its own internal analysis and evaluations, INAC has sparingly implemented the findings of those reports. While efforts have been made to improve the FNCFS Program, including through the EPFA and other additional funding, those improvements still far short of addressing the service gaps, denials and adverse impacts outlined above and ultimately fail to meet the goal of providing culturally appropriate child and family services to First Nations children and families living on-reserve that are reasonably comparable to those provided off-reserve."

Canada was ordered to immediately cease its discriminatory conduct. The Tribunal retained jurisdiction and set out a four phase remedy process: 1) immediate relief to address the most egregious impacts of the discrimination; 2) mid term reform to address some of the structural factors and 3) longer term reform and 4) compensation for children harmed by Canada's discriminatory conduct. The Tribunal also retained jurisdiction over an obstruction to justice matter related to Canada's conscience non-disclosure of documents highly prejudicial to its case.

The Ministers of Justice and Indigenous Affairs welcomed the ruling and did not appeal it. However compliance has been very problematic.

2016 CHRT 10

On April 26, 2016, the Tribunal issues the first compliance order against Canada (2016 CHRT 10) having considered submissions by the

Government of Canada that included Budget 2016. Specifically, the Tribunal recognized that longer term reform will take time but notes in para. 23 that **"[T]he Panel orders INAC to immediately take measures to address the items underlined above (in para 20) from the findings of the Decision**." The Tribunal went on to order INAC to produce detailed information on the sufficiency of Budget 2016 in satisfying the order.

Regarding Jordan's Principle in para. 31 the Tribunal noted that INAC and Health Canada have met and will begin consulting with the provinces/territories and First Nations about Jordan's Principle. In para. 32, the Tribunal then noted "[**T]he order is to "immediately implement" not immediately start discussions**…"

The Tribunal then orders INAC to immediately consider Jordan's Principle as: 1) including all jurisdictional disputes including those between INAC and Health Canada; 2) the government body of first contact pays for the service without review or case conferencing before funding is provided. INAC was ordered to confirm its compliance on May 10, 2016.

INAC wrote to the Tribunal on May 10, 2016 and stated it landed on a definition of Jordan's Principle restricting it to children with disabilities and short-term illnesses. INAC leaves unanswered why it feels First Nations children without a disability or short -term illness should not be guaranteed access to public services on the same terms as other children. It does not confirm that the child will access services on the same terms as other children as required by the Decision and the *Canadian Human Rights Act*. Instead, INAC says cases will be managed in a "timely manner."

2016 CHRT 16

Following the filing of Canada's compliance reports regarding 2016 CHRT 10 and submissions by the other parties, the Tribunal issued a second compliance order on September 16, 2016. The Tribunal described 2016 CHRT 10 in para. 3 stating that "[T]he Panel reiterated and emphasized certain findings and adverse impacts from the Decision and ordered INAC to take measures to address those findings and adverse impacts immediately. The Tribunal noted the lack of information sharing by INAC stating in para 9. that "the Panel fails to understand why much of the information provided in INAC's most recent submissions could not have been delivered earlier, especially if this information formed part of the rationale for determining the budget for the FNCFS back in March 2016. …It rests on INAC and the federal government to implement the Panel's findings and orders and to clearly communicate how it is doing so, including providing a rationale for their actions and any supporting data and/or documentation."

The Tribunal noted that "further orders, including additional information and reporting by INAC, are required to ensure the findings in the Decision with respect to the FNCFS Program have been or will be addressed in the short term."

The Tribunal was concerned to read in INAC's submissions much of the same type of statements and reasoned that it has seen from the organization in the past. **"The fact that key items like determining funding for remote and small agencies were deferred to later is reflective of INAC's old mindset that spurred this complaint."** The Tribunal went on to say **''While the Panel understands that INAC is determined to reform its entire FNCFS and believes it intends to do so it is concerned that deferring immediate action in favour of consultation and reform at a later date will perpetuate the discrimination the FNCFCS program has fostered for the past 15 years."**

On Jordan's Principle the Tribunal recognized the Government of Canada's new announcement but noted it is short on details as to how it complied with the Decision noting that Canada's new formulation appeared to be narrower than the one in the National Program Manual that was found to be discriminatory (para 117).

The Tribunal issued 7 new orders and required Canada to produce further detailed reports to be filed on September 30, 2016 and another on October 31, 2016.

The Government of Canada filing on September 30, 2016 stated **"The rationale for the five-year plan was developed in fall 2015 as part of the 2016 federal Budget process, prior to the January 26, 2016 Tribunal decision. As part of this annual process, departments usually prepare their proposals between September and November, after which time further deliberations are subject to Cabinet confidence…"**

Further information from INAC to demonstrate how its new formulation of Jordan's Principle as applying only to children with complex medical needs and children with disabilities as well as how Budget 2016 meets the requirements of the CHRT are to be filed on October 31, 2016. The Tribunal has called a case conference for November 7-9, 2016.

Reviews of INAC's CFS Program:

a) Joint National Policy Review (2000)*. This review was jointly conducted by INAC and AFN with the participation of First Nations child welfare agencies. There were 17 recommendations for reform, including the provision of more prevention funding, resolution of jurisdictional disputes to ensure First Nations children could access services on the same terms as other children and the recognition of First Nations jurisdiction. None of the recommendations related to increasing funding for children and families were ever implemented.

b) Wen:de Reports (2005)*. The Wen:de reviews were jointly conducted by INAC and AFN with the participation of First Nations child welfare agencies and over 20 leading experts in fields such as child welfare, economics, community development, law, and information technology. It resulted in a series of three reports identifying the funding shortfalls in detail and proposing a new funding formula and policy reforms. Most of the substantial recommendations were not implemented or implemented improperly.

c) Auditor General of Canada (2008*, 2011). Found Canada's funding for the First Nations CFS program to be flawed and inequitable. The United Nations Committee on the Rights of the Child

(2012) expressed concern that the recommendations of the Auditor General of Canada had not been fully implemented.

d) Standing Committee on Public Accounts (2009,* 2012).

*Full reports available at: http://www.fncaringsociety.com/i-am-witness-first-nations-child-and-family-services-funding

Information on the other INAC funding models?

Refer to the information sheets on Directive 20-1, Enhanced Focused Prevention Approach, the 1965 Indian Welfare Agreement and INAC funding arrangements with Provinces and Territories available at www.fnwitness.ca
Find more information on Jordan's Principle at www.jordansprinciple.ca

For more information on the case go to
www.fnwitness.ca or contact info@fncaringsociety.com

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